JOHN NEILSON of Chappel, and JAMES LANRICK of Ladylands, } *Appellants;*

JOHN MURRAY, *et alii*, *Respondents.*

14*th March*, 1732.

FIAR—A wife having in her marriage contract conveyed her estate in favour of her husband and herself in conjunct fee and liferent, and the survivor of them, and the heirs of the marriage; the fee was found to be in the husband, although the wife survived, and there were no heirs of the marriage entitled to succeed under the contract.

SERVICE OF HEIRS—PAPIST—A general service as nearest heir Protestant to the husband, found to be a sufficient title to carry the fee settled in the marriage contract, the children of the marriage being Papists, and therefore legally disqualified from succeeding.

No. 16.

THE lands of Conheath descended to two heirs portioners, of whom Elizabeth Maxwell, a papist, had by her first marriage two sons, John Murray (the respondent) who was a protestant, and James a papist. She entered into a second marriage with Gilbert M'Cartney, and by the marriage contract she conveyed her half of the said estate (although she had neither been infeft herself, nor served heir to her father,) "to the said M'Cartney and herself, "in conjunct fee and liferent, and the survivor of "them, and the heirs of their bodies, begotten of "the future marriage, which failing"——then fol-

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lowed a blank which was never filled up.* She survived M'Cartney, and had issue of the marriage, a son William, and a daughter, who were both papists.

Thereafter she made a conveyance of the estate in favour of James her second son, which she prevailed on her son William M'Cartney to make effectual, by granting a disposition of all right which he might have under his father's marriage contract.

John Murray, having served heir to his grandfather, raised an action of reduction for setting aside this disposition, on the ground that it was null and void, by force of the acts, 1695, c. 26, and 1700, c. 3, William the granter of it being a papist.

The Lords repelled an objection of *jus tertii* pleaded against the pursuer, and found the grounds of reduction relevant and proven, and reduced accordingly. This judgment was affirmed upon ap-
Feb. 16, 1726. peal in the House of Lords.†

Upon petitioning to have the judgment of the House of Lords applied, a new title was set up by the appellants, who now founded on a conveyance by Elizabeth Maxwell in their favour, of several apprisings affecting the estate. Various proceedings ensued, in which objections were stated to the validity of the apprisings, and of these conveyances. It seems only necessary to notice the following points.

* The terms of the deed do not occur verbatim in the appeal cases. They are given above as quoted by Mr. Robertson in his report of the first branch of the case, referred to infra.

† Vide Robertson's Appeal Cases, No. 125.

The respondent pleaded that by the marriage settlement betwixt Elizabeth Maxwell and Gilbert M'Cartney, the fee of the estate was vested in the husband, upon whose death it might have descended to the heirs of the marriage, had they not been incapable of inheriting, and that therefore the right of succession to the estate devolved upon his next heir, Agnes, (a daughter by a previous marriage,) who had been served nearest protestant heir to him;—that the respondent had obtained a conveyance from her of all right which her father had acquired by his marriage contract, in virtue of which conveyance he was entitled to the estate.

To this the appellants answered, that Agnes M'Cartney, not being the issue of her father's second marriage, could have no claim to the estate settled in the contract of marriage. The estate having been disponed to Gilbert M'Cartney in conjunct fee and liferent with Elizabeth herself, and longest liver of them, and Elizabeth having survived her husband, the fee necessarily remained in her who was yet alive, and must (had she not sold the estate) have descended to the heir of the marriage, not as heir of provision to the father, but as heir of provision to her.

But even supposing the fee to have been in Gilbert, so that upon the failure or incapacity of the issue of the marriage, it would have devolved upon his next heir, still Agnes could not carry a right to it by a general service as heir of line to her father, but ought to have been served heir of provision under the marriage contract; in which case the death or incapacity of the children of the mar-

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riage must have been proved, and the contract itself produced before the inquest, and evidence given that she was the next heir entitled to be served under it; but nothing of all this was done; and therefore her service as heir in general of line to her father could not be effectual to carry a right to the estate; so that never having made up a sufficient title herself, the conveyance by her to the respondent was void.

July 20, 1728. The court found "that the general service is a "good title; the pursuer (respondent) proving "that the children of Gilbert M'Cartney's second "marriage were reputed papists, and bred in po-"pish families."

In a petition against this judgment, it was further stated, that the conveyance by Elizabeth Maxwell in favour of her second husband ought to have no effect, inasmuch as the onerous cause in consideration of which it had been granted, viz. a jointure out of his estate, had never been enjoyed

Feb. 18, 1729. by her. The court "repelled the objection, that "the onerous cause of the lands being disponed "by the said Elizabeth Maxwell, was a jointure "she never enjoyed,—and found that M'Cartney, "the husband, was fiar."

Entered Feb. 18, 1731. The appeal was brought from several interlocutors of the 28th June, 20th July, 1728, the day of January, 18th and 22d February, 1729, 28th July, and day of November, 1730, and 5th February, 1731.

Judgment March 14, 1732. After hearing counsel, "it is ordered and ad-"judged, &c. that the appeal be dismissed, and

" that the several interlocutory sentences therein " complained of be affirmed."

1732.

HAMILTON
v.
THE DUTCH EAST INDIA COMPANY, &c.

For Appellants, *P. Yorke, Dun. Forbes, R. Dundas, Ch. Areskine.*
For Respondents, *C. Talbot,* and *Will. Hamilton.*

CAPTAIN ALEXANDER HAMILTON, *Appellant;*
The LORDS DIRECTORS of the DUTCH EAST INDIA COMPANY, and WILLIAM DRUMMOND, their Factor, - - - - - } *Respondents.*

4th April, 1732.

FOREIGN—PROCESS—RES JUDICATA—The final sentence of a competent court in a foreign state, forms a sufficient defence, *exceptione rei judicatæ.*

[Fol. Dict. I. p. 323. Mor. Dict. p. 4548.]

No. 17.

A VESSEL, of which the appellant was a proprietor, was seized by the Dutch East India Company, on a charge of contraband trade, and condemned in the court of Malacca. An appeal was taken to the High Court of Batavia, by which the sentence was affirmed.

1711.

Some years afterwards part of the cargo of a Dutch East India ship, which was wrecked on the

1728.